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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 756

NEWS SYNDICATE CO. INC.,

Petitioner,

—against—

GEORGE W. SMILEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the

Supreme Court of the United States

October Term, 1970

No. ——

News Syndicate Co. Inc.,

Petitioner,

—against—

George W. Sarah,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

In this action for libel and invasion of privacy, based upon newspaper reports of a judicial proceeding, petitioner, News Syndicate Co. Inc. respectfully prays that a writ of certiorari issue to review final rulings of law of the Court of Appeals of the State of New York on the ground that these rulings so violate First Amendment freedoms as to warrant their prompt review by this Court.

Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, providing for an order favorable to petitioner, is unreported and is annexed as Appendix A. The Appellate Division unanimously affirmed without opinion. 32 A.D.2d 744 (1st Dep't 1969). The divided opinions of the Court of Appeals (4–3) are reported at 27 N.Y.2d 9 (1970) (Appendix B).

Jurisdiction

The judgment of the Court of Appeals was entered on July 1, 1970. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

Questions Presented

1. Are accurate newspaper reports of a judicial proceeding, published without malice entitled to the constitutional privilege afforded by this Court's holding in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny?

2. Is the petitioner, a newspaper publisher, entitled to a defense of truth as to claimed invasion of privacy arising out of current reports of a judicial proceeding?*

Constitutional and Statutory Privileges Involved

The constitutional and statutory provisions involved are set forth in Appendix C. They are the First and Fourteenth Amendments to the Constitution of the United States, Sections 50, 51 and 74 of the Civil Rights Law of New

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* The majority opinion flatly stated: ". . . truth is irrelevant to a charge of invasion of privacy" and ignored petitioner's citation of this Court's opinion in *Time, Inc.* v. *Hill*, 385 U.S. 374 (1966).

York and Section 235 of the Domestic Relations Law of New York.

Statement of the Case

On February 20, 1967 respondent's third wife commenced an action for a judicial separation from respondent in the Supreme Court of the State of New York, County of New York, by the service and filing of a summons and complaint. An order to show cause and affidavits in support of a motion for temporary alimony, sole custody of the child, ownership of the home and counsel fees were also served and filed. On March 7, 1967 respondent (defendant therein) served his answering papers. On March 9, 1967 the motion was submitted to the Court.

Prior to the submission of the motion, respondent's wife gave petitioner's reporter copies of the pleadings and all papers filed in the judicial proceeding. On March 10, 1967, the day after the motion was submitted, a report of the proceeding was published in separate editions of petitioner's newspaper (first and second articles). On Friday, March 17, 1967 the decision of the court, which granted respondent's wife's motion, was published in the New York Law Journal and on Sunday, March 19, 1967 a report of that decision was also published by petitioner (third article). On April 3, 1967, the court signed an order based on the decision and on April 16, 1967 the final article complained of was published (fourth article). Other than a minor argument as to one of the articles, an argument ignored by all courts below, respondent has never contested the fact that the articles were accurate reports.

Respondent commenced this action on June 7, 1967. His complaint set forth causes of action for libel and for statutory invasion of privacy (New York Civil Rights Law Sections 50 and 51). By answer served on September 8, 1967, petitioner pleaded its statutory absolute privilege (New York Civil Rights Law Section 74) to make a fair and true report of a judicial proceeding (Second Defense) and a constitutional privilege to make a fair, true and accurate report of a judicial proceeding, without malice, as to all causes of action (Third Defense). It also pleaded truth as a defense to all causes of action (Fourth Defense) as well as a defense based on the First and Fourteenth Amendments (Fifth Defense).

Respondent moved to strike petitioner's statutory defense based on New York Civil Rights Law Section 74, its constitutional privilege to make a fair, a true and accurate report of the judicial proceeding, without malice, and its defense of truth as to the alleged invasion of privacy. Respondent moved to dismiss the affirmative defense which pleaded that application of Section 235 of the Domestic Relations Law to prohibit reports of matrimonial proceeding was an unconstitutional interference with the freedom of press. He also moved for leave to amend his complaint to plead falsity and malice as to the alleged invasion of privacy.

The Supreme Court of New York sustained the defenses with the exception of the Fifth Defense which was stricken on the ground that it was a legal conclusion and that it was academic because Section 235 of the New York Domestic Relations Law was inapplicable. It also granted respondent's motion for leave to amend to plead falsity

and malice. The Appellate Division affirmed, without opinion.

The Final Rulings of the Court of Appeals

On July 1, 1970, the Court of Appeals reversed the order of the Appellate Division and laid down two rules of law directly contrary to the mandate of the First and Fourteenth Amendments of the Constitution and the holdings of this and other courts.

Before this case reached the Court of Appeals, the lower courts of New York had ruled that petitioner was entitled to prove its defenses in the trial court. Now, four judges of the Court of Appeals (three dissenting) have stated as a matter of law that (1) "truth is irrelevant to a charge for invasion of privacy" based on news reports of a matrimonial proceeding, and (2) a defense based upon a constitutional privilege to fairly and truly report a judicial proceeding, without malice, is not sufficient in an action for libel or invasion of privacy where the reported proceeding was a matrimonial proceeding.

In making its second ruling, the Court relied upon Section 235 of the Domestic Relations Law. This statute prohibits a court officer or his clerk from permitting any examination of matrimonial papers in his custody except by a litigant or his attorney or by court order. The Court held that Section 235 evidenced public policy of the State to afford general secrecy to reports of matrimonial actions. It is a fact, however, that petitioner obtained its information neither from the court files nor from any officer of the court, and no court has held that petitioner violated Section 235.

Reasons for Granting the Writ

At the outset, it is noted that a final judgment in the sense of a judgment based on a jury's verdict is not here involved. However, petitioner here seeks a review of definitive rulings, binding upon the Trial Court, that are of general application to publishers and that are so invasive of the freedom of press that a prompt review of these rulings is warranted.

Petitioner submits that the rulings of the Court of Appeals have a very real chilling effect upon freedom of the press and as noted by this Court in *Mills* v. *Alabama*, 384 U.S. 214 (1965), justify a prompt review by this Court. As pointed out, in *Mills*, to await a final judgment:

> "would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets."

In *Mills*, the petitioner had been indicted under a criminal statute. But a civil action "may be markedly more inhibiting than fear of prosecution under a criminal statute" where safeguards of a criminal action are not available. *New York Times* v. *Sullivan*, 376 U.S. 254, 277 (1964).

We submit that these rulings of the highest State Court, which are binding upon all New York State publishers and lower courts, are ripe for review by this Court. Indeed, unless reviewed by this Court now, these restrictive unconstitutional determinations may not be subject to review for many years.

These Rulings Conflict With the First and Fourteenth Amendments of the Constitution of the United States.

(a) *There is a constitutional privilege to make accurate reports of judicial proceedings, without malice.*

The issue here is whether an accurate report of a judicial proceeding is constitutionally protected. In *New York Times Co.* v. *Sullivan*, this Court held that in view of the First Amendment, a report of the actions of a public official or, as it were, a report of official proceedings, could not be the basis for a defamation action, unless plaintiff could prove actual malice as defined in that case. Since 1964 a body of law has extended the *Times* doctrine to not only reports of official proceedings but also to reports concerning matters of public interest and to private individuals speaking out on matters of public interest. Petitioner submits that a report of a judicial proceedings, whatever the subject matter, is as much entitled to that privilege as are articles concerning baseball players, gamblers or persons involved in official or legislative proceedings.

The privilege afforded by *Times* v. *Sullivan* is but a logical extension of the protection given First Amendment freedoms in civil and criminal cases. Indeed, although this Court has noted in the past that a civil action for defamation may have a more chilling effect than a criminal prosecution, a criminal action predicated upon reports of pending lawsuits cannot be brought unless there is a "clear and present danger" to the administration of justice. *Craig* v. *Harney*, 331 U.S. 367, 374 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1945). As this Court stated in *Craig:*

> "There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government to suppress, edit, or censor events which transpire in proceedings before it."

If a State is proscribed from using reports of judicial proceedings as the basis for criminal actions against publishers, it would seem that the State through its judiciary is constitutionally barred from denying a publisher the privilege afforded by the First Amendment to make accurate reports of any judicial proceeding, published without malice, unless it can be shown that a clear and present danger to the administration of justice exists. See *Dorfman* v. *Merszner*, 39 U.S.L. Week 2014 (7th Cir. 1970).

It may be argued by respondent that because the judicial proceeding in this case was a matrimonial action, it did not involve a matter worthy of First Amendment protection in light of Section 235 of the Domestic Relations Law. It should be noted that Section 235 is not a general secrecy statute, although obviously, the Court of Appeals so read it.

The Court below evidently found that the reporting of the matrimonial action violated broad public policy of New York. The implications of this holding are grave when applied to petitioner's constitutional privileges. In sum, the ruling below was a determination of what judicial proceedings could or could not be reported. We submit, further, that a court may not constitutionally pick and choose what is newsworthy where reports of judicial proceedings are involved, but may proscribe such reports only where a clear and present danger exists to the administration of justice.

(b) *As to invasion of privacy, truth is a defense.*

This Court had before it in *Time, Inc.* v. *Hill*, an exception to the New York statutory invasion of privacy called the "newsworthy" exception. There, this Court held that where a matter was newsworthy, the publisher would not be liable for violation of the statute unless it could be proved that the matter was false or fictionalized and that the publisher had published with malice.

This exception to the common law and New York's statutory invasion of privacy also relates to items of current or fresh news. *Wagner* v. *Fawcett*, 307 F.2d 409 (7th Cir. 1962); *Binns* v. *Vitagraph Co.*, 210 N.Y. 51, 56 (1913); *Sidis* v. *F-R Pub. Corporation*, 34 F. Supp. 19 (S.D.N.Y. 1938); affd. 113 F.2d 806 (2nd Cir. 1940), cert. den. 311 U.S. 711 (1940); *Lahiri* v. *Daily Mirror*, 162 Misc. 776 (Sup. Ct. N.Y. Co. 1937). In *Binns* the Court said:

> "It would not be within the evil sought to be remedied by that act [Sections 50 and 51 of the Civil Rights Law] to construe it so as to prohibit the use of the name, portrait or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper."

In this case, Justice Sarafite at Special Term recognized that the articles complained of were indeed current news, permitted respondent to amend his answer to plead falsity and malice by reason of the rationale of this Court in *Time, Inc.* v. *Hill* and held that truth was a defense in such circumstance.

In *Time, Inc.* v. *Hill* this Court upheld the constitutionality of New York's right of privacy statute on the assumption that truth was a complete defense to such cause of

action. That case did not even involve an item of current news. Here, petitioner submits, is a case that does involve current news: *a fortiori* the rule of *Time, Inc.* v. *Hill* should apply.

While recognizing that a truth defense was available to petitioner in an action for libel, the Court of Appeals held that if a plaintiff also asserts a claim for invasion of right of privacy, truth may not be proved as a defense. This is an instance of a giving and a taking away, merely by virtue of labels. Under this holding, no publisher can risk publishing an accurate and true account of any judicial proceeding that names the parties. The Court of Appeals disregarded the rationale and holding of this Court in *Time, Inc.* v. *Hill.*

The rejection of pleaded truth in this action exposes the press to risks that go far beyond "chilling" and constitutes a restraint upon freedom of press that violates the First Amendment.

CONCLUSION

We submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the New York Supreme Court

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART I

[SAME TITLE]

SARAFITE, *J.*:

In this action for libel and invasion of privacy based upon publication of news articles by defendant, plaintiff moves to strike certain defenses from defendant's answer and for leave to serve an amended complaint.

Plaintiff contends that the publication of facts concerning a proceeding for judicial separation brought by his wife, caused him to be discharged by his employer, defamed him, was used for commercial purposes in violation of his civil rights and constituted an invasion of his privacy.

Among the defenses pleaded by defendant, it is asserted that the publication was privileged as a fair and true report of a judicial proceeding. Another defense, asserted upon a detailed state of facts, is truth. Another defense asserts that plaintiff's claim that defendant violated section 235 of the Domestic Relations Law, prohibiting copying or inspection of court files of matrimonial proceedings, seeks to impose an unconstitutional interference with freedom of speech and press.

The papers demonstrate no dispute as to the publication of facts contained in the matrimonial proceeding involving

plaintiff and his wife. Plaintiff, however, urges that defendant violated section 235 of the Domestic Relations Law by such publication, in that the court files are secret and, therefore, the defense of privilege is barred. Plaintiff cites persuasive authorities in support of his contention. Defendant argues that the source of its information was not court files but copies of court papers furnished by a litigant, viz., plaintiff's wife, and by publications in the New York Law Journal. In this respect, the issues in this case are distinguishable from the authorities cited by plaintiff. Since defendant contends it did not inspect the court files but obtained its information from outside sources its defense that it published a fair and true report of judicial proceedings is meritorious and raises a genuine issue (Civil Rights Law, §74). Accordingly, that branch of the motion seeking to strike such defense is denied.

The papers further demonstrate that defendant's publication about plaintiff was clearly made in the course of its business of disseminating fresh news and not used for advertising or trade purposes contemplated by sections 50 and 51 of the Civil Rights Law. (See Sidis v. F-R Pub. Corp., D.C.N.Y., 1938, 34 F. Supp. 19, cert. den. 311 U.S. 711; Goelet v. Confidential, Inc., 5 A D 2d 226.) Moreover, the statements contained in the publication appear to be a true report of the facts contained in the matrimonial proceeding and are substantially undisputed. Consequently, that branch of the motion seeking to strike the defense of truth is denied.

That branch of the motion to strike the defense of unconstitutionality of the application of section 235 of the Domestic Relations Law is granted. Such defense is a bare legal conclusion unsupported by any facts. Moreover, the defense is academic because of the factual distinction show-

ing the inapplicability of section 235 of the Domestic Relations Law.

That branch of plaintiff's motion seeking leave to serve an amended complaint is granted. The court will freely allow amendment to pleadings without weighing the merits of the proposed new allegations.

Settle order.

Dated, April 25, 1968

J. A. S.
J. S. C.

APPENDIX B

Opinion of the Court of Appeals

Argued April 14, 1970—Decided July 1, 1970.

GEORGE W. SHILES,

Appellant,

—v.—

NEWS SYNDICATE CO., INC.,

Respondent.

Chief Judge FULD

One of the questions posed by this appeal is whether the defendant, which published articles detailing charges made by the plaintiff's wife in a matrimonial action, may plead the absolute privilege of fair and true report of a judicial proceeding, under section 74 of the Civil Rights Law, as a defense to libel and to invasion of privacy causes of action.

In the spring of 1967, the defendant, News Syndicate Co., Inc., published a series of three articles in its newspapers, the *Daily News* and the *Sunday News*, purporting to report a separation suit brought against George W. Shiles, the plaintiff herein, by his wife, Rose Marie Shiles.[1]

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[1] The articles were based upon charges contained in a copy of an affidavit made by the wife in support of her motion for temporary alimony which she had delivered to the defendant.

Prefaced by headlines such as "Wife Says Air Exec Had Harem" and "Wife Says Exec Built a Harem in the Sky", the articles stated, among other things, that Mrs. Shiles had accused her husband of using his position as an airline executive to entice applicants seeking jobs as airline stewardesses to become "women for his private harem" and that the company paid the bills for these women; and that the plaintiff beat her, went out with other women, deserted and failed to support her and that his "sexual habits" were of a "depraved character."

Following the publication of these articles, the plaintiff instituted this action for libel and for invasion of privacy. In the libel causes of action, the plaintiff alleges that the articles were false and defamatory and, in his invasion of privacy counts, that the articles were published "for advertising purposes and for purposes of trade and without [his] consent", in violation of sections 50 and 51 of the Civil Rights Law. The complaint further asserts that the defendant's use of copies of the papers filed in the matrimonial action as a source for its articles was a "violation of the secrecy provisions" of section 235 of the Domestic Relations Law.[2]

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[2] Section 235—which in 1962 replaced rule 278 of the Rules of Civil Practice—insofar as pertinent, recited:

"Information as to details of matrimonial actions.

"An officer of the court with whom the proceedings in an action to annul a marriage or for divorce or separation are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court."

Although a motion for temporary alimony and affidavits filed in connection therewith are not, technically speaking, "pleadings"

In its answer, the defendant not only expressly denied those specific allegations but also pleaded several affirmative defenses to both the libel and the invasion of privacy causes of action. More specifically, in two such defenses (the second and the third), the defendant claimed that the articles constituted "fair and true reports of judicial proceedings * * * and were and are privileged" under section 74 of the Civil Rights Law.[2] And, in another affirmative defense (the fourth), the defendant declared that the articles "are true in substance and in fact." The plaintiff moved, pursuant to CPLR 3211 (subd [b]) to strike "the defense of fair and true report of a judicial proceeding", based on the section 74 privilege, and to strike "the defense of truth" insofar as such defense pertains to the invasion of privacy causes of action. The court at Special Term denied the motion, the Appellate Division affirmed the resulting order and the appeal is before us by leave of that court on a certified question.

Section 235 of the Domestic Relations Law, which prohibits the taking of copies, or even the inspection, of the

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(CPLR 3011), the parties have assumed, and there is basis for the assumption, that the affidavit of the plaintiff's wife and his opposing affidavit—which contained some of the details reported—come within the coverage of the statute.

[2] Section 74 of the Civil Rights Law reads as follows:

"Privileges in action for libel.

"A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

"This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof."

records of matrimonial proceedings by any one other than the parties or their counsel, manifests a clear legislative design that those proceedings be kept secret and confidential. Notwithstanding its broad language, we do not believe that section 74 of the Civil Rights Law was ever intended to defeat this design by extending to persons who, despite section 235, were able to obtain such records, the right to publish and disseminate their contents without regard for their truth or falsity or for the harm they may cause to the reputations of the individuals involved.

The reason underlying the privilege of fair and true report of a judicial proceeding is, as we declared some years ago (*Lee* v. *Brooklyn Union Pub. Co.*, 209 N. Y. 245, 248), "the public interest in having proceedings of courts of justice public, not secret, for the greater security thus given for the proper administration of justice." (See, also, *Williams* v. *Williams*, 23 N Y 2d 592, 597.) In most types of proceedings the advantage in having judicial proceedings made public "more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings." (*Rex* v. *Wright*, 8 Durn, & E. 293, 298.) On the other hand, however, the Legislature has, at least since 1847 (Gen. Rules of Prac., rule 118; see, also, Rules Civ. Prac., rule 278; Domestic Relations Law, § 235), made it plain that in matrimonial actions the balance of convenience is in favor of the individual and that in the case of papers filed in such actions the public interest is served not by publicizing them but by sealing them and prohibiting their examination by the public.

Since, then, such matrimonial actions were and are not proceedings which the public had the right to hear or see, it follows—and it has been consistently held—that the

privilege generally accorded to reports of judicial proceedings is unavailable to reports of matrimonial actions. (See, e.g., *Danziger* v. *Hearst Corp.*, 304 N. Y. 244, 248; *Stevenson* v. *News Syndicate Co.*, 276 App. Div. 614, affd. on other grounds, 302 N. Y. 81; see, also, *Matter of New York Post Corp.* v. *Leibowitz*, 2 N. Y. 2d 677, 682; *Stuart* v. *Press Pub. Co.*, 83 App. Div. 467, 478.) The cited cases were founded upon a recognition of the inherently personal nature of matrimonial proceedings and the obvious desirability that records of such proceedings not be "used to gratify private spite or promote public scandal" (*Matter of Caswell*, 18 R. I. 835, 836; see *Stevenson* v. *News Syndicate Co.*, 276 App. Div. 614, 618, *supra*) and, certainly, not to permit one spouse to force the other into a desired settlement by threatening disclosure and publication of the charges and accusations contained in the pleadings or affidavits filed in the matrimonial action. It is apparent, therefore, that the privilege created by section 74 of the Civil Rights Law does not attach to the publication of a report of matrimonial proceedings.

This does not mean that a party may not publish details of a divorce or separation suit based on files obtained without a court order, or that the courts would interfere with the constitutional right of any one to publish such details, but it does mean that, if he does, he will be held accountable and liable if those details are not truthful. (See *Danziger* v. *Hearst Corp.*, 304 N. Y. 244, 248-249, *supra;* see, also, *Matter of United Press Assns.* v. *Valente*, 308 N. Y. 71, 77.) Thus, in *Danziger*, where the defendant had published an illegally obtained affidavit, the court, after declaring that the rule of secrecy does not prohibit publication of the details of a matrimonial action that are obtained from a

source other than the files of the court, went on to hold that *"such a publication is actionable if defamatory"* (304 N. Y., at p. 248; emphasis supplied).

As the quoted passage makes clear, the fact, relied upon at Special Term, that the defendant in the present case "did not inspect the court files but obtained its information from outside sources", will not protect the defendant from liability for the consequences resulting from the publication of false and defamatory statements.[4] However, the defendant urges, an amendment to section 337 of the Civil Practice Act—the predecessor of section 74 of the Civil Rights Law—had the effect of overruling the decision in the *Danziger* case (304 N. Y. 244, *supra*). More particularly, the defendant points out that, at the time *Danziger* was decided, section 337 provided that the privilege applied to reports of "any judicial, legislative or other *public* and official proceedings". Since, in 1956, the quoted language was amended to read: "any judicial proceeding, legislative proceeding or other official proceeding" (L. 1956, ch. 891), the defendant argues that the deletion of the word, "public,"

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[4] The fact that the defendant obtained his information not from the court files but, second hand, from a litigant in the action raises a question whether its articles actually constitute a report of the "judicial proceeding." It might well be argued that the articles were nothing more than the *republication of accusations* made against the plaintiff by his wife which, though similar in content to those made in the course of such a proceeding, were not a part of it and, accordingly, not covered by the statute. Indeed, our recent decision in *Williams* v. *Williams* (23 N Y 2d 592, *supra*) provides some support for the conclusion that one who obtains the information published from the very party authoring the pleading or other writing should not be entitled to assert the statutory privilege of fair report of a judicial proceeding. We held, in the *Williams* case, that that privilege was unavailable as a defense in a libel action brought against the party who had himself mailed to people in the trade copies of a complaint which he had previously filed against the plaintiff.

was intended to extend the privilege to judicial proceedings which are placed in a legally sealed file and to which it had not previously been applied.

The only authoritative indication of the Legislature's design and purpose when it passed the statute is Governor Harriman's memorandum of approval when he signed the act amending the law, and it effectively negates the defendant's construction of the amendment. The Governor had been advised, in memoranda, submitted to him by one or another of the parties opposing the amendment,[5] that the bill before him might be interpreted to permit as privileged the report of proceedings in matrimonial actions. In order to foreclose the possibility that the amendment would be so construed, the Governor made it clear that the act was not intended to change or weaken the safeguards of the various provisions designed to protect the secrecy of certain judicial proceedings; this is what he wrote (N. Y. Legis. Annual, 1956, pp. 494-495):

> "• • • it should be noted that our statutes contain many provisions which preserve the secrecy of [illegible]uments and testimony, such as in matrimonial actions (Rule 278, Civil Practice Act), the secrecy of testimony before a grand jury (Section 952, Code of Criminal Procedure) or statements made by a grand juror during the deliberations of the grand jury (Section 265, Code of Criminal Procedure). There are other

[5] See, e.g., Report of Committee on State Legislation of Association of the Bar of the City of New York, 1956 Bulletin No. 3, p. 83; Report No. 12 of Committee on State Legislation of New York State Bar Association (1956); Memorandum of Executive Secretary of Law Revision Commission (April, 1956); see, also, Memorandum of Governor Dewey vetoing similar 1952 bill, N. Y. Legis. Annual, 1952, p. 381.

comparable safeguards in the Executive, Legislative and Tax Laws and in other laws.

"My approval of this bill cannot and should not be construed as a modification or weakening of the justifiable protections embodied in the laws mentioned. Secrecy and other safeguards where provided by our laws continue to be in effect and to be fully respected." (Emphasis supplied.)

Viewed in the context of Governor Harriman's memorandum—which, as stated, provided the only significant legislative history in this case (see, e.g., *Teeval Co.* v. *Stern*, 301 N. Y. 346, 362)[6]—it is patent that the amendment was not designed to effect any change in the scope of the privilege as it had been previously applied to judicial proceedings. By deleting the word, "public," the Legislature was merely extending the privilege to certain quasi-judicial and nonjudicial proceedings—such as those conducted by administrative agencies—which are not generally considered to be "public" in nature or which might not be open to the public. (Cf., e.g., *Wiener* v. *Weintraub*, 22 N Y 2d 330.)

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[6] A few years later, when section 235 of the Domestic Relations Law was adopted—to replace rule 278 of the Rules of Civil Practice—the Legislative Committee which recommended its enactment referred to the *Danziger* case, making it even more manifest that the members of that committee did not believe that it had been overruled or affected by the 1956 amendment. The following comment of the Committee is illuminating (Fourth CPLR Report, N. Y. Legis. Doc., 1960, No. 20, p. 386):

"The matter is of sufficient importance to warrant treatment in the statute, involving as it does the difficult problem of balancing the right of the public to know what goes on in our courts and the need to protect litigants and the courts against scandal-mongering. See *Danziger* v. *Hearst Corp.*, 304 N. Y. 244, 248-49".

As the Appellate Division so well put it in *Stevenson* v. *News Syndicate Co.* (276 App. Div. 614, 618-619, affd. on other grounds 302 N. Y. 81, *supra*),

> "• • • it is illogical to hold that the defendant had the right to publish to its millions of readers information which not one of those readers could personally obtain. In situations where the public have the right of access to proceedings in open court, or the right to inspection of filed papers, the effect of a newspaper publication is that defendant's reporter is the agent of the public to report to them what they could hear or see if they so desired. [Case cited.] But when the public have no right to see the papers filed in a matrimonial action, a newspaper should not have the right to spread the allegedly false contents of those papers to the public."

Neither considerations of public policy nor the strictures of the Civil Rights Law require us to permit a defendant to exploit the private life of an individual by publishing sensational charges without bearing the consequences of the harm resulting to him if those published charges are untrue. The records of proceedings in an action for divorce or separation are kept sealed precisely because disclosure of their contents could cause great harm to the persons involved without producing any countervailing public benefit. In short, section 74 of the Civil Rights Law does not afford a party a license to destroy by indirection the salutary protection afforded by section 235 of the Domestic Relations Law.

It follows from what we have written—with respect to an action for libel—that the statutory privilege of fair and true

report of a judicial proceeding may not be invoked as a defense to invasion of privacy. Whether or not section 74, captioned and entitled, as it is, "Privileges in *action for libel*", would ever be available in an action for invasion of privacy, the policy considerations underlying and embodied in section 235 of the Domestic Relations Law render section 74 unavailable in any suit based upon a report of a matrimonial action in which the disclosure of information is forbidden except by court order.[7]

Nor, where no public figure is involved, may truth be pleaded as a defense to the causes of action for invasion of privacy. The very nature of that tort is the publication and exploitation of a person's private life and activities in such a manner as to cause him embarrassment and mental suffering. Since such injury may result even if the material published is entirely accurate, it follows that truth is irrelevant to a charge of invasion of privacy.[8] As Warren and Brandeis declared in their seminal article, The Right to Privacy (4 Harv. L. Rev., at p. 218), "The truth of the matter published does not afford a defence [to an action for invasion of privacy]. Obviously this branch of the law should have no concern with the truth or falsehood of the matters published. It is not for injury to the individual's character that redress or prevention is sought,

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[7] We would merely note that Special Term's characterization of the articles as "fresh news" has nothing whatsoever to do with the availability of this section 74 privilege as an affirmative defense to an invasion of privacy action.

[8] See, *e.g.*, *Koussevitzky* v. *Allen, Towne & Heath*, 188 Misc. 479, 484, affd. 272 App. Div. 759; *Youssoupoff* v. *Columbia Broadcasting System*, 19 A D 2d 865; *Man* v. *Rio Grande Oil Co.*, 28 F. Supp. 845; *Cason* v. *Baskin*, 155 Fla. 198, 217; *Barber* v. *Time, Inc.*, 348 Mo. 1199, 1205; see, also, Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 218; Hofstadter and Horowitz, The Right of Privacy [1964], p. 256.

but for injury to the right of privacy. For the former the law of slander and libel provides perhaps a sufficient safeguard. *The latter implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all.*" (Emphasis supplied.)

In sum, the statutory privilege accorded to fair and true report of a judicial proceeding is not available to the defendant for the articles published and may not be invoked as a defense either to the causes of action for libel or for invasion of privacy. Nor is truth a valid defense to the latter causes. The plaintiff's motion to strike these defenses should have been granted.

The order appealed from should be reversed, with costs, the question certified answered in the negative and the matter remitted to the Supreme Court, New York County, for further proceedings in accordance with this opinion.

DISSENTING OPINION PER BREITEL, *J.*

It would be difficult, if the question were still open for this court, to dispute the policy judgments reached in *Danziger* v. *Hearst Corp.* (304 N. Y. 244), and *Stevenson* v. *News Syndicate Co.* (276 App. Div. 614, affd. on other grounds, 302 N. Y. 81) and stated so well in Governor Dewey's veto memorandum on a 1952 bill identical with the 1956 amendment which is the crux of this case (1952 Public Papers, Gov. Thomas E. Dewey, p. 296). The trouble is that the question of policy is ultimately for the Legislature if indeed it has determined the question. This it did in 1956 and the bill was approved by Governor Harriman. In the latter's approval memorandum he did not disagree with what Governor Dewey and the Association of the Bar of the City of New York had viewed as the

effect of the earlier identical proposed legislation, all of which was before the Legislature or available to it when it passed the 1956 bill. Nor did he disagree with the detailed and documented views prepared for him in 1956 by the Executive Secretary of the Law Revision Commission and the Attorney-General, each of whom advised him that the effect of the bill was as Governor Dewey had said of the earlier one in 1952, and as the Association of the Bar of the City of New York had said then, in 1955, and was still saying in 1956 (see Reports of Committee on State Legislation, Assn. of Bar of City of New York: 1952 Bull. No. 1, p. 19; 1955 Bull. No. 3, p. 145; 1956 Bull. No. 3, p. 83).[1] In the words of the Attorney-General: "This bill amends Section 337 of the Civil Practice Act. Its obvious purpose is to overcome the decision of *Stevenson* v. *News Syndicate*". While Governor Harriman did not disagree, he expressed the expectation, a vain hope as one can see from this case, that the statutory secrecy surrounding selected judicial proceedings would prevent undesirable publication.[2]

Consequently from 1952 to 1956 and even to the present time, there has been unanimity that the 1952 bill, a 1955 bill, and the identical and successful bill of 1956, by deleting the word "public", had the purpose of overruling the *Danziger* and *Stevenson* cases (*supra*). The effect was to give newspapers absolute immunity from tort liability for publication of "fair and true reports" of judicial, legis-

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[1] Bill jackets, assembled in the Governor's offices, have been used as an aid in ascertaining legislative intent (e.g., *Williams* v. *Williams*, 23 N Y 2d 592, 601 [conc. opn. per BURKE, J.]; *County of Erie* v. *City of Buffalo*, 4 N Y 2d 96, 104; *People ex rel. Makin* v. *Williams*, 22 A D 2d 497, 499; *De Ville* v. *Continental Assur. Co.*, 10 A D 2d 386, 390, affd. 8 N Y 2d 1080).

[2] The entire memorandum by Governor Harriman is appended.

lative, or other official proceedings, even if not public (see *Keogh* v. *New York Herald Tribune*, 51 Misc 2d 888, 891, affd. 28 A D 2d 1209, mot. for lv. to app. den. on other grounds, 21 N Y 2d 955). (The citation by the CPLR revisers to the *Danziger* case, *supra*, "304 N. Y. 244, 248-49, 107 N. E. 2d 62, 64", refers not to the holding on the scope of the privilege afforded by Civ. Prac. Act, § 337, but to the opinion's discussion of the purposes of rule 278 of the Rules of Civil Practice, restricting distribution of filed papers by court officers [Fourth Prelim. Report of Advisory Comm. on Practice, N. Y. Legis. Doc., 1960, No. 20, p. 386].)

Were there any possible doubt in the matter, and the language of the statute as amended must be finely strained to raise a doubt, the 1952 bill jacket then before Governor Dewey dissipates it. The real sponsors for the vetoed 1952 bill, representatives for three separate newspapers or chains, including the lawyers for the present defendant, presented their views in formal memoranda making clear that the newspapers were seeking immunity in tort from publishing judicial materials required to be kept secret by the then Rules of Civil Practice (Domestic Relations Law, § 235). The bar association and civic organization opponents to the bill urged veto, at least one of them citing the harmful effects that would otherwise ensue in matrimonial and filiation judicial proceedings. Finally, item 6 of the bill jacket is a contemporary news item from an Albany newspaper reciting that an Assemblyman "offered an amendment that would have excluded matrimonial, adoption, or parenthood proceedings from the exemptions granted by the bill, but it was defeated overwhelmingly."

I could quite agree with the concluding words in Governor Dewey's memorandum on the 1952 bill:

"It should be noted that the bill does not affect freedom of the press to print the truth or even to print falsehood if uttered in a public proceeding. This bill seeks to establish a right of freedom to report falsehood, without liability or responsibility, when the falsehood is uttered in a proceeding from which the public is barred. There should be no license to destroy by indirection the salutary protection afforded by the rules of court or statutes in such cases." [3]

Four years later, however, the Legislature and a different Governor made an identical bill the law of the State. The patent and uniformly consistent legislative history, quite unneeded in the face of the plain statutory language, sets unequivocally the purpose and meaning of the 1956 amendment. The result, however unfortunate it may be regarded, may not justify contradiction of the legislative command.

Accordingly, I dissent and vote to affirm.

Judges BURKE, BERGAN and GIBSON concur with Chief Judge FULD; Judge BREITEL dissents and votes to affirm in a separate opinion in which Judges SCILEPPI and JASEN concur.

Order reversed, etc.

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[3] The entire memorandum of Governor Dewey is appended.

APPENDIX

1952 Public Papers of Governor Dewey, pp. 296-297

ALBANY, April 19, 1952

Memorandum filed with Senate Bill, Introductory Number 197, Printed Number 1744, entitled:

"AN ACT to amend the civil practice act, in relation to the privileges in action for libel."

NOT APPROVED.

In the case of *Stevenson* v. *News Syndicate Co.*, 276 App. Div. 614, affirmed on other grounds, 302 N. Y. 81, it was held that a newspaper which prints a report of judicial proceedings which are not open to the public is civilly liable if the report is libelous. This bill would permit the publication of reports concerning judicial, legislative or other official proceedings to which the public does not have access and grant the publisher immunity without the necessity for proving truth.

Since 1847 the pleadings, testimony and other papers in matrimonial actions have been sealed under a judicial rule of civil practice. Unless leave is granted by the court, they may be examined only by the parties and their attorneys. Similar statutory protection is provided in a number of other situations, including children's courts, wayward minor proceedings, youthful offender cases and adoption matters where it has been determined that the necessity for the protection of the persons involved transcends the right of public access to the information.

The rule is different for public proceedings. The Civil Practice Act affords publishers absolute immunity if the

account published is a fair and true report of a public proceeding. This bill extends the privilege to all official proceedings whether public or private, whether protected by statute or by rule of court, whether sealed or open.

The language of the court in the Stevenson case is worthy of note:

> "* * * by rule 278 it was, in effect, provided that in matrimonial actions the balance of convenience is in favor of the individual. That rule is founded on the policy that 'no one has a right to examine or obtain copies of public records for mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful and sometimes disgusting details of a divorce case, not only fails to serve any useful purpose in the community, but on the other hand directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. The judicial records of the state should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same, but they should not be used to gratify private spite or promote public scandal.'
>
> "In my opinion, it is illogical to hold that the defendant had the right to publish to its millions of readers information which not one of those readers could personally obtain. In situations where the public have the right of access to proceedings in open court, or the right to inspection of filed papers, the effect of a newspaper publication is that defendant's reporter is the agent of the public to report to them what they could hear or see if they so desired. But

when the public have no right to see the papers filed in a matrimonial action, a newspaper should not have the right to spread the allegedly false contents of those papers to the public." (276 App. Div. at 618, 619, citations omitted).

It should be noted that the bill does not affect freedom of the press to print the truth or even to print falsehood if uttered in a public proceeding. This bill seeks to establish a right of freedom to report falsehood, without liability or responsibility, when the falsehood is uttered in a proceeding from which the public is barred. There should be no license to destroy by indirection the salutary protection afforded by the rules of court or statutes in such cases.

The bill is disapproved.

THOMAS E. DEWEY

APPENDIX

1956 Public Papers of Governor Harriman, pp. 444-445

ALBANY, April 20, 1956

Memorandum filed with Assembly Bill, Introductory Number 99, Print Number 99, entitled:

"AN ACT to amend the civil practice act, in relation to the privileges in action for libel."

APPROVED.

The law presently affords the defense of privilege in an action for libel to one who publishes a true and fair report "of any judicial, legislative, or other public and official

proceedings." This bill would amend the law by deleting the reference to "public." In other words it would make it possible to publish, as in a newspaper, a report of a judicial, legislative or other official proceeding even though it is not public.

However, it should be noted that our statutes contain many provisions which preserve the secrecy of documents and testimony, such as in matrimonial actions (Rule 278, Civil Practice Act), the secrecy of testimony before a grand jury (Section 952, Code of Criminal Procedure) or statements made by a grand juror during the deliberations of the grand jury (Section 265, Code of Criminal Procedure). There are other comparable safeguards in the Executive, Legislative and Tax Laws and in other laws.

My approval of this bill cannot and should not be construed as a modification or weakening of the justifiable protections embodied in the laws mentioned. Secrecy and other safeguards where provided by our laws continue to be in effect and to be fully respected.

In the light of all these circumstances the bill before me appears to be reasonable. Undue restrictions upon the freedom of the press are not advisable.

This bill is approved.

AVERELL HARRIMAN

APPENDIX C

Constitutional and Statutory Provisions Involved

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

• • • • •

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to

any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred *in aid of insurrection* or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * * * *

NEW YORK DOMESTIC RELATIONS LAW

§ 235. *Information as to details of matrimonial actions or proceedings*

An officer of the court with whom the proceedings in a matrimonial action or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party who had appeared in the cause, except by order of the court.

If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceeding or someone interested, on order of the court.

• • • • •

NEW YORK CIVIL RIGHTS LAW § 50

§ 50. *Right of privacy*

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

NEW YORK CIVIL RIGHTS LAW § 51

§ 51. *Action for injunction and for damages*

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic produc-

tions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

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NEW YORK CIVIL RIGHTS LAW § 74

§ 74. *Privileges in action for libel*

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 756

NEWS SYNDICATE CO., INC.,

Petitioner,

—against—

GEORGE W. SHILES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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On the brief

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The Case

Under the headlines "Wife Says Exec Had Harem" and "Wife Says Exec Built a Harem in the Sky," petitioner published in its DAILY NEWS and SUNDAY NEWS lurid charges of respondent's wife in a New York separation action. Petitioner in the same articles repeated details of the most intimate and embarrassing nature from an affidavit respondent himself had submitted to the court. Respondent sues for libel for publishing the lurid charges and for invasion of privacy for revealing respondent's intimate matters as well as for revealing the lurid charges. Respondent was a $33,000 a year Vice President of American Airlines. He had been with the company for 27 years

and says he was summarily discharged upon the publication of the first of these articles.

Petitioner obtained the material for these articles from respondent's wife. She handed petitioner's reporter carbon copies of pleadings and affidavits including respondent's own affidavit which had been filed in the court. This case turns on the New York statute (§235 of Domestic Relations Law) which prohibited the clerk of the court from displaying to petitioner or any other member of the public, the originals of those same papers. Respondent maintained that since the public was barred by statute from examining the papers, the New York privilege statute (§74 of Civil Rights Law) which grants absolute privilege to report judicial proceedings did not extend over into this area. The Court of Appeals agreed but petitioner complains that this violates its constitutional rights.

A Writ Should Be Denied

Because false, scandalous and offensive charges and countercharges are commonplace in matrimonial actions, it has been the declared public policy of the State of New York since 1847 to bar the general public from the court files in such actions. Originally that policy was enforced by rule (1847—Gen. Rules of Proc., 118). It continued by rule until 1962 (Rule 278 of Rules of Civil Procedure) but that year it was incorporated in a statute (§235 of Domestic Relations Law).* The reason for the decision

* The pertinent part of §235 is set forth in the opinion of the Court of Appeals (Appendix p. 4a). Petitioner sets forth a version of it in the appendix but that version includes an amendment added after the publications complained of (Appendix p. 24a).

below is simple. The privilege statute (§74 of Civil Rights Law)* should not give the right to publish without liability for damages scandalous material from which the public is barred by another statute (§235 of Domestic Relations Law).

This is not new law. Before a 1956 amendment to the privilege statute which extended its scope, the same question was raised in libel actions and the determination was the same, namely, that contents of matrimonial files were published at peril. *Danziger* v. *Hearst Corp.*, 304 N.Y. 244; *Stevenson* v. *Hearst Consolidated Pub.*, 214 F.2d 902, cert. denied 348 U.S. 874;** *Stevenson* v. *News Syndicate Co., Inc.*, 276 App. Div. 614.

The New York Court of Appeals made it abundantly clear in *Danziger, supra,* that the secrecy statute (§235 of Domestic Relations Law) in no way whatsoever limits the absolute right to report *without tort liability* the fact that a matrimonial action had been brought; to report the courtroom proceedings; and to report the decision or verdict. Moreover the *Danziger* decision made it just as clear that a publisher also had the right to publish the contents of the secret files but he did so at his peril and was liable for damages if it was defamatory. More particularly the *Danziger* opinion stated:

> "The defendants assail rule 278† as violation of the constitutional guarantees of freedom of the press. This criticism of the rule fails, we think, to take proper

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* §74 also is set forth (Appendix p. 26a).

** It is significant that certiorari was denied in this case.

† As already noted Rule 278 was the predecessor of §235 of Domestic Relations Law.

> account of its scope and purpose. The rule [now statute] is addressed to officers and clerks of the New York Supreme Court. It does not prohibit access to the minutes of the clerk of the court and thus does not interfere with the right of any person to obtain information in respect of the pendency or result of any matrimonial action. Nor does the rule prohibit publication of the details of a matrimonial action that are obtained from a source other than the files of the court. Of course, such a publication is actionable if defamatory. But this liability for indefensible defamation cannot be taken to be an unconstitutional restriction of the freedom of the press" (at pp. 248-249).

Manifestly, if the wife had not filed the papers, we would have a simple case of libel and invasion of privacy and even petitioner would agree that it would not justify this petition. But since the papers were filed in court, petitioner asserts a right to broadcast them as a part of a judicial proceeding. Petitioner's claim boils down to the proposition that there is a constitutional right to report a judicial proceeding and it is so inflexible, sweeping and overriding that it precludes any such things as confidential court files. That, says petitioner, abridges freedom of the press. We do not suggest that the constitution does not guarantee the right to report judicial proceedings within some limits that might be defined. But we do suggest that this case does not fall within any such area. Here we deal with a statute not only dictated by common decency but with a long history of sound public policy designed to protect individuals from this crude scandalmongering and sensationalism. Since no one denies the right of petitioner to exercise its bad taste and publish these vicious articles,

the claim that the court below abridges freedom of the press for merely imposing tort liability is a hollow claim. It is far-fetched and raises no genuine constitutional question. Petitioner might as well argue that imposing damages for any libel abridges freedom of the press.

We do feel called upon to answer one specific argument made by petitioner. It suggests that *Time, Inc.* v. *Hill*, 385 U.S. 374, is authority for the proposition that truth is a complete defense in an action for invasion of privacy (Pet. pp. 9-10).* That argument is untenable. In the *Hill* opinion this Court said:

> "In the light of questions that counsel were asked to argue on reargument, it is particularly relevant that the Court of Appeals made crystal clear in the *Spahn* opinion that truth is a complete defense in actions under the statute based upon reports of newsworthy people or events. * * * " (at pp. 382-383).

Plaintiff is not a public figure. Moreover the contents of a file from which the public is legally barred hardly can be considered legally newsworthy.

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* Petitioner gives the impression that the court below has held that truth is never a defense regardless of whether or not a public figure is involved. More particularly, petitioner twice quotes the court below as follows: "* * * truth is irrelevant to a charge of invasion of privacy" (Pet. pp. 2 & 5). But petitioner ignores the opening sentence of the paragraph which commences: "Nor, where no public figure is involved * * * " (Appendix p. 13a).

CONCLUSION

A writ of certiorari should be denied.

Respectfully submitted,

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